

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 13, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP1550

Cir. Ct. No. 2009CX3

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN P. RASSBACH,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for St. Croix County:
EDWARD F. VLACK III, Judge. *Affirmed.*

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. John Rassbach, pro se, appeals a summary judgment granting the State's civil consumer enforcement action to obtain restitution for injured consumers arising out of Rassbach's overcharging customers for fuel that was never delivered. Rassbach argues the State is barred

from obtaining restitution in this civil action because it did not seek restitution in the criminal case against him. He also argues the State possesses unspecified documents that would show the amount of his fraud was less than claimed. Rassbach further argues the circuit court improperly used facts from his criminal case as the basis for granting summary judgment in this civil case. We reject Rassbach's arguments and affirm.

¶2 Rassbach owned and operated a fuel delivery business known as Rassbach Oil Company. During an investigation into Rassbach's conduct, an investigator from the Department of Agriculture, Trade and Consumer Protection personally observed Rassbach delivering diesel fuel to customer's fuel tanks. Rassbach then billed those customers for more fuel than he delivered.

¶3 Two search warrants were subsequently executed, resulting in the seizure of business records and a personal computer from Rassbach's office. Based on these business records, the State calculated Rassbach overbilled customers by \$130,631.91 for diesel fuel and gasoline deliveries between February and August 2008. The records also reflected overbilling by \$1,529.87 for propane.

¶4 Rassbach was charged in St. Croix County with fourteen counts of fraudulently charging customers for fuel that was not delivered. He pled and was subsequently convicted of four counts of felony theft—false representation, in violation of WIS. STAT. § 943.20(1)(d).¹

¶5 The State commenced a civil consumer protection enforcement action against Rassbach to obtain restitution for all victims of his overbilling, not

¹ References to the Wisconsin Statutes are to the 2011-12 version unless noted.

just the victims of the St. Croix County criminal case. The State subsequently filed a motion for summary judgment. The State conceded several reductions in the amount of restitution sought, and the circuit court granted summary judgment for \$109,396.55. Rassbach now appeals.

¶6 We employ the same methodology as the circuit court when reviewing grants of summary judgment. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 314-16, 401 N.W.2d 816 (1987). A party is entitled to summary judgment when there are no genuine issues of material fact and that party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).

¶7 Rassbach argues the State is barred from obtaining summary judgment in this civil action because it did not seek restitution in the criminal case against him. He insists the criminal justice system should not be employed to perform the functions of a collection agency. Having failed to obtain restitution in the criminal case, Rassbach asserts the State should not be allowed a second “kick at the cat.”

¶8 Rassbach’s argument has it backwards. The State is not using criminal procedure to collect a debt. Rather, it is pursuing restitution through the consumer protection statutes explicitly designed for that purpose. The statutes explicitly recognize the independence of the two means of obtaining restitution. WISCONSIN STAT. § 973.20(8) provides in part:

Restitution ordered under this section does not limit or impair the right of a victim to sue and recover damages from the defendant in a civil action. The facts that restitution was required or paid are not admissible as evidence in a civil action and have no legal effect on the merits of a civil action. Any restitution made by payment or community service shall be set off against any judgment in favor of the victim in a civil action arising out of the facts or events which were the basis for the restitution. The

court trying the civil action shall hold a separate hearing to determine the validity and amount of any setoff asserted by the defendant.

¶9 Accordingly, even if the State had sought and obtained criminal restitution on behalf of the St. Croix County victims, it would not have precluded a civil judgment in the present consumer protection case, even for the same victims. However, the State is not seeking to collect restitution twice for the same conduct, in any event. In fact, no criminal restitution was ordered, and Rassbach's argument that the State is barred from pursuing restitution in the civil case is meritless.

¶10 Rassbach also argues "that the State is in possession of documents, which have been requested, and never delivered," that would show the amount of his fraud was less than claimed. He asserts that "it is not up to Rassbach to prove that these records exist, it is up to the State, (the moving party) in this law suit to prove they don't exist."

¶11 The logical extension of Rassbach's theory is that any party responding to a summary judgment motion could defeat that motion by simply alleging that additional unspecified documents exist, without stating any particularities as to those records. Rassbach's argument is inconsistent with the statutorily prescribed burden on the party opposing summary judgment to set forth specific facts showing there is a genuine issue for trial. *See* WIS. STAT. § 802.08(3).

¶12 Here, the State presented detailed facts upon which it relied in establishing the amount of Rassbach's overcharging. In response, Rassbach has not set forth any specific facts disputing the overbilling amount. His failure to do so compels this court to affirm summary judgment in this case.

¶13 Finally, Rassbach argues the circuit court improperly used the facts of the St. Croix County criminal case, also appealed, as the basis for granting summary judgment in the civil action. He asserts that until the criminal appeal is resolved, there are genuine issues of material fact in dispute precluding summary judgment.

¶14 Rassbach's argument is spurious. The decision to grant summary judgment was based solely on the facts and submissions properly presented as part of the State's motion. Rassbach points to no facts outside the summary judgment record upon which the circuit court relied in deciding the State's motion.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

